

SUPREME COURT OF THE UNITED STATES

Term, 1943

No.

COMMONWEALTH OF PENNSYLVANIA

vs.

A. M. BYERS COMPANY,*Petitioner.*

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI**

SPECIFICATIONS OF ERROR

The Supreme Court of Pennsylvania erred in the following respects:

1. The Supreme Court of Pennsylvania erred in holding that the corporation was liable for tax for the year 1935, and that it was not prejudiced nor harmed in any way by the revocation of the fiscal year permission.

2. The Supreme Court of Pennsylvania erred in not holding that the Department of Revenue had no authority to revoke the fiscal year permission, previously granted,

Specifications of Error

after Petitioner had filed its Capital Stock Tax Report for interim period January 1, 1935 to October 1, 1935, as provided in the second paragraph of Section 702 of the Fiscal Code of April 9, 1929, P. L. 343, 72 PS Sec. 702, as amended by Act of June 1, 1931, P. L. 318, 72 PS 702.

3. The Supreme Court of Pennsylvania erred in not holding that the Department of Revenue had no authority to refuse to make a settlement on the interim report from January 1, 1935 to October 1, 1935, as provided in the second paragraph of Section 702 of the Fiscal Code of April 9, 1929, P. L. 343, 72 PS Sec. 702, as amended by Act of June 1, 1931, P. L. 318, 72 PS 702.

4. The Supreme Court of Pennsylvania erred in holding that there was no violation of the Federal Constitution, which error was occasioned because it did not consider the arbitrary action by the Department of Revenue's revoking fiscal year permission granted subsequent to January 1, 1935, and not revoking fiscal year permissions granted previous to January 1, 1935 for companies admittedly, literally, in the same class—companies engaged in manufacturing.

ARGUMENT

1. The action of the Department of Revenue, sustained by the Supreme Court of Pennsylvania, that the corporation was liable for tax for the year 1935 deprives the corporation of property without due process of the laws, and denies to it the equal protection of the laws.

Obviously, Section 3 of the Act of May 16, 1935, P. L. 184, 72 PS 1892 b, makes corporations organized for manufacturing purposes liable for Capital Stock Tax for only two years, either two calendar years 1935 and 1936 or for the fiscal years beginning in the calendar years 1935 and 1936. There is no provision in the 1935 Act for settling tax for a portion of the year on a calendar year basis and the remainder of the period to total twenty-four months, or two years, on a fiscal year basis. The apportionment of taxes on a uniform basis, is, therefore, met by imposing tax in this case for the two fiscal years beginning in the calendar years 1935 and 1936. This was recognized by the opinion of the Court of Common Pleas of Dauphin County, Pennsylvania, on exceptions, (R. 201a, 202a).

There is no denial that classifications of corporations may be made by the Legislature but Section 702 of the Fiscal Code, Act of April 9, 1929, P. L. 318, 72 PS 702, as amended by Act of June 1, 1931, P. L. 318, 72 PS 702, does not provide for classification of corporations. Neither does it permit classification by the Department of Revenue of corporations filing on fiscal year basis, warranting revoking fiscal year permissions granted to certain manufacturing corporations subsequent to January 1, and not revoking like permissions granted to manufacturing corporations prior to January 1 of any year.

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Petitioner does not claim an exemption from Capital Stock Tax for the first nine months of 1935 to October 1, because of any fiscal year ending September 30, 1935, but because the first fiscal year began October 1, 1935, it was liable for tax without manufacturing exemption, for the two fiscal years beginning in 1935 and 1936, as like corporations whose fiscal years began any time during 1935 and 1936, in accordance with Section 3 of the 1935 Act, *supra*.

2. The Supreme Court of Pennsylvania should have followed the decision of the Court of Common Pleas of Dauphin County, Pennsylvania, on exceptions.

The decision of the Supreme Court of Pennsylvania that Section 702 of the Act of April 9, 1929, P. L. 343, 72 PS 702, as amended by the Act of June 1, 1931, P. L. 318, 72 PS 702 provides for *permissive* action by the Department of Revenue relates only to the first paragraph of the Section, and contains not one reference of the mandatory provisions of the second paragraph. Proof of the mandatory effect of the second paragraph of Section 702 of the Fiscal Code appears clear from the reading of the Supreme Court's opinion, (R. 256, 257), which refers to the fact that, February 2, 1937, Section 702 was amended, which makes it mandatory that corporations reporting to the United States on a fiscal year basis report upon the same basis for State taxation. The only changes in Section 702 were in the first paragraph, and the only relative change was the elimination of the word "may" and substituting therefor the word "shall". The word "shall", appearing in the third and the sixth lines of the second paragraph, was there before the 1937 Amendment to the Fiscal Code. The inconsistency in the decision of the Supreme Court of Pennsylvania is obvious.

The Supreme Court of the United States decided that

a gross receipts tax, imposed on the gross receipts of incorporated operators but not on the gross receipts of natural persons and partnerships carrying on the same business unconstitutionally deprives the corporations of the equal protection of the laws, because the character of the owner was the sole fact on which the distinction and discrimination were made to depend, *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 402, 72 L. ed. 927, 930, (1928).

There is not any difference in the character of the corporation in the case of the Petitioner and other corporations in Petitioner's class, but the Secretary of Revenue of Pennsylvania revoked the fiscal year permissions of all corporations, including the Petitioner, having been granted since January 1, 1935, and did not revoke the fiscal year permissions of any corporation, literally, of the same class, granted prior to January 1, 1935, to file Capital Stock Tax Reports on a fiscal year basis. The discrimination against the Petitioner is obviously a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of the United States decided that a statute imposing an attorney's fee not to exceed \$10.00 in addition to costs, upon railway corporations omitting to pay certain claims within a certain time after presentation, which applies to no other corporations or individuals, was a classification not based upon reasonable ground—some difference which bears a just and proper relation to the attempted classification, but a mere arbitrary selection, and, therefore, was a violation of the equality clause of the Fourteenth Amendment, *Gulf, Colorado, & Santa Fe Railway Company v. W. H. Ellis*, 165 U. S. 150, 165, 41 L. ed. 666, 672, (1897).

The same is true in the case of the Petitioner. The

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selection to revoke fiscal year permissions was merely arbitrary.

3. The Supreme Court of Pennsylvania denied the petitioner the due process and the equal protection of the laws in its opinion in failing to conclude that the Department of Revenue had no authority to refuse to make the settlement on the interim report.

Decision of the Supreme Court of Pennsylvania to the effect that granting or revoking the permission to file on a fiscal year is permissive under the first paragraph of Section 702 of the Fiscal Code was never contested, and was not, and is now not in question, but the reference by the Court to Section 702 of the Fiscal Code, as amended in 1937, 72 PS 702, to sustain the conclusion that the action under the first paragraph of the Section is permissive, as the 1937 Act changed the word "may" to the word "shall", making it mandatory to file fiscal year reports under the 1937 Amendment, is equally applicable here to show that the word "shall" appearing in the third and sixth lines of the second paragraph of Section 702 as it existed during 1935, meant "mandatory".

Section 2, of the Fiscal Code of April 9, 1929, P. L. 343, 72 PS 2, indicates that the act (meaning the Fiscal Code) is intended to define the powers and duties of the Department of Revenue. This aids in an interpretation of Section 702, in that the Department of Revenue "may permit" corporations to make any Capital Stock Tax Report on a fiscal year basis. This is covered by the word "power" in the first paragraph of Section 2. The second paragraph of Section 702 of the 1929 Act, as amended in 1931, indicates that the first report made by any corporation changing a report from a calendar to a fiscal year basis shall cover the period from the last day of the calendar year, and the Department of Revenue shall settle the tax on the interim re-

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port. This is covered by the word "duty" upon the corporation to file the report, and a "duty" upon the Department of Revenue to settle the tax for such intervening period, "a duty" defined pursuant to Section 2 of the Fiscal Code, and, therefore, both the action of the corporation filing the report and the duty of the Department of Revenue to make the settlement are "mandatory". The opinion of the Supreme Court of Pennsylvania (R. 256) states that no administrative officer or body, exercising discretion conferred by the legislation is vested with the power to abrogate the statute law of the Commonwealth. This principle of law is correct, but has been erroneously applied by the Supreme Court. The fiscal year permission was intended to operate prospectively beginning October 1, 1935, and this corporation was liable for Capital Stock Tax, without manufacturing exemption, for the two fiscal years beginning October 1, 1935 and October 1, 1936, as provided in Section 3 of the Act of May 16, 1935, P. L. 184, 72 PS 1892 b. But the principle expressed by the Supreme Court of Pennsylvania is applicable to the conclusion that the Department of Revenue, the administrative body, is not vested with the power to abrogate the statute law of the Commonwealth, as it applies to the second paragraph of Section 702 of the Fiscal Code, April 9, 1929, P. L. 343, 72 PS 702, as amended by the Act of June 1, 1931, P. L. 318, 72 PS 702, which contains the mandatory provision for the corporations filing the interim report and the settlement thereon by the Department of Revenue.

An ordinance in San Francisco, California, required laundry operators to obtain consent of the Board of Supervisors if their operations were to be carried on in buildings not constructed of brick or stone. A Chinaman operating a laundry in a wooden building applied for and was refused consent of the Board, but operated a laundry, was arrested and found guilty of violating the ordinance. The

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facts in the case showed that the Chinaman was carrying on the business without having such special consent, as was true of more than 150 other Chinamen, while those who were not subjects of China, and who were conducting 80 odd laundries under similar conditions, were left unmolested and free to enjoy the enhanced trade and profits arising from this hurtful and unfair discrimination. The Supreme Court of the United States, reversing the Circuit Court, said that constitutional laws administered despotically leave no less odious results than the administration of unconstitutional laws. The results are the same, and the Constitution of the United States guarantees equal protection in both cases, *Yick Wo. v. Peter Hopkins*, 118 U. S. 356, 373, 30 L. ed. 220, 227, (1886).

The filing the interim report was necessary for the protection of the Petitioner. Otherwise, it would have been subjected to penalty for late filing the report, as provided in Section 1702 of the Fiscal Code, Act of April 9, 1929, P. L. 343, 72 PS 1702, as amended by the Act of June 1, 1931, P. L. 318, 72 PS 1702. The Petitioner did not have any alternative to filing the interim report, unless Petitioner's Officers wanted it to be subjected to a penalty under the law. It would have been, obviously, unreasonable to expect Petitioner not to act until seventy-five days after October 1, 1935 had expired, first paragraph of Section 702, Act of April 9, 1929, P. L. 343, 72 PS 702, as amended by the Act of June 1, 1931, P. L. 318, 72 PS 702,—seventy-five days expired December 15, and the expiration of the sixty day extension, Section 704, Act of April 9, 1929, P. L. 343, 72 PS 704,—or February 15, to learn whether the Department of Revenue intended to revoke the fiscal year permission, regularly granted. The record shows that the Department of Revenue attempted to revoke the fiscal year permission February 28, 1936, (R. 26a, 27a).

Disregard of the second paragraph of Section 702 of the Fiscal Code, as amended during 1931, obviously injuriously affects the property rights of the Petitioner, and it was incumbent upon the Petitioner to act for its protection and to prevent the sacrifice of its property. Accordingly, the filing the interim report was mandatory, and the provision requiring settlement on the report by the Department of Revenue was mandatory.

A statute of California provided that in case of delinquent taxes, so much of the property as may be necessary to pay the delinquent taxes and the cost shall be offered for sale, and the proceeds applied to pay the judgment and cost. The officer departed from the requirements of the statute and sold the entire tract of land. The Supreme Court of the United States concluded that the statutory requisition should not have been disregarded, and that, accordingly, the judgment must be reversed, inasmuch as the requirement was intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights would be injuriously affected, *French v. Edwards*, 80 U. S. 506, 20 L. ed. 703, (1872).

4. The Supreme Court of Pennsylvania erroneously concluded that there was no violation of the Federal Constitution in the revocation of the fiscal year permission granted subsequent to January 1, 1935.

Fiscal year permissions granted to Pennsylvania manufacturing corporations prior to January 1, 1935 were not revoked, but all fiscal year permissions granted subsequent to January 1, 1935 to manufacturing corporations for filing Capital Stock Tax Reports were revoked.

Equal protection of the laws require that all persons subjected to legislation shall be treated alike, under like circumstances and conditions, both in the privileges confer-

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red and in the liabilities imposed, *Magoun v. Illinois Trust & Saving Bank*, 170 U. S. 283, 293, 42 L. ed. 1937, 18 Sup. Ct. 594, (1898).

The immediately aforementioned legal principle is applicable inasmuch as manufacturing corporations having been granted fiscal year permission subsequent to January 1, 1935 were not treated the same as those granted fiscal year permission prior to January 1, 1935, under like circumstances and conditions. Section 3 of the Act of May 16, 1935, P. L. 184, 72 PS 1892 b, provides that corporations organized for manufacturing purposes shall be taxed, without manufacturing exemption for the two calendar years 1935 and 1936 or for the two fiscal years beginning in 1935 and 1936. Accordingly, Petitioner is subject to tax without manufacturing exemption only for the two fiscal years beginning October 1, 1935 and October 1, 1936, the same as like corporations which were granted fiscal year permission prior to January 1, 1935.

The doings of those charged with the administration of the statute may be unlawful while the statute itself is valid, *Cummings v. Merchants National Bank of Toledo*, 101 U. S. 154, 161, 25 L. ed. 903, (1880).

Wherefore, it is respectfully submitted that this Petition should be granted.

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Counsel for Petitioner.